In the Supreme Court

OF THE

United States

OCTOBER TERM, 1902.

THOMAS P. QUEENAN, Plaintiff in Error, vs. TERRITORY OF OKLAHOMA, Defendant in Error.	NO. 246.

Error to the Supreme Court of the Territory of Oklahoma.

BRIEF OF DEFENDANT IN ERROR.

The first point raised by plaintiff in error goes to the admissibility of certain evidence. [P. R. p. 24.] The

witness, John H. Beatty, was asked if certain acts of the accused, which he had previously related, had made any impression upon his mind relative to the sanity or insanity of the accused. He replied that they had not done so at the time of their occurrence. He was then asked whether these facts, when recalled, aroused in his mind, at the time of his examination, any impression or opinion of the sanity or insanity of the defendant at the time that the circumstances occurred.

ADMISSIBILITY OF CERTAIN EVIDENCE.

To this question the territory objected on the ground that it was incompetent. And the court, in holding it incompetent, used the following language "I think that it is incompetent for the purpose of this trial." And so ruled it out. Upon this record counsel have reared an argument to the effect that since they were seeking to elicit an opinion formed subsequent to the happening of the events, an exclusion of this testimony must have been because the opinion was formed subsequent to the circumstances upon which it must have been based. The court will of course immediately notice that this is not so much an erroneous conclusion as it is an incomplete one. It is possible for the trial court to have excluded the answer to this question on other grounds than the one assigned by counsel.

The fundamental rule is that facts alone, not opinions or conclusions are admissible. To this rule there exists the exception that, under proper circumstances, the opinions of non-experts upon the question of sanity are admissible; but they are not admitted, except when tested

and when they pass the test of all the established rules of evidence, applicable generally.

State vs. Pike, 49 N. H. 401.

They are not admitted when they violate the established rules of evidence relating to relevancy or pertinency.

Cochran vs. Little, 18 Atl. 701.

They are not admissible when they violate the doctrines of relevency.

State vs. Pike, Supra.
Also Sullivan vs. Hugley, 32 Ga. 316.

They are not admitted when, from the facts detailed, it is as possible for the jury to arrive at an opinion as it was for the witness.

Wharton Criminal Evidence, Sec. 459 and cases cited.

They are not admitted, when the witness has by his previous testimony shown his incompetency to form an opinion. They are not admitted when the facts upon which the opinion is formed are not given, or when the facts disclosed such a state of affairs as would prohibit the arrival at more than one opinion.

From the record, who can pick out what one or more objections existed in the mind of the court to the introduction of this testimony? Counsel have picked out from the number of all possible reasons which might have been operative in causing the exclusion of this testimony the one, and that arbitrarily, which they deemed to be unsound. We are led from the record to infer what was the ground taken by the trial court in rejecting the offer of testimony. When neither the ground of the objection nor

the ground upon which the objection was sustained was set forth, why, then, can counsel be permitted to argue that the offer was rejected because of a reason illegally founded; when, from anything that the record discloses, we are justified in applying any one of several reasons, any one of which might be deemed sufficient for the rejection.

It is a ground rule of appellate practice that error is is never presumed.

Humphrey vs. Collins 23 Kansas 549.

Admitting that the trial court rejected this testimony upon the ground alleged by counsel and admitting that this ground would not form a sufficient reason for its rejection, still the rule of law is that if the evidence thus rejected for an improper reason is for any other reason known to the law inadmissible, no prejudicial error has been committed.

Enc. Pleading and Practice, Vol. 2, p. 372
and cases cited.

"If the judgement, decision, or ruling of the inferior tribunal is correct on any legal ground, it will be affirmed although the reasons assigned by the court below are erroneous."

Enc. Pleading and Practice, Supra.

We believe no error to have been committed by the rejection of this testimony for the reason that the record discloses that the witness had not such an intimate knowledge of the defendent as would entitle him to express an opinion. When the witness was asked, (P. R. Page 22) if he knew the defendent and how intimately he had known him, he replied, "quite well, I had him do my barber work for some years. Q. What do you say; are

you acquainted with his disposition as to kindliness and affection and amiability or otherwise? A. I used to be, yes sir." It seems to us needless to cite authorities to the point that in order for the opinions of non experts to be admissible, they should disclose that their association with the defendent has been such as to have enabled them to closely examine his conduct, manner and appearance and so close consecutively as to have enabled them to note any change in the manner or demeanor of the defendant. The authorities very generally hold in addition that a wide discretion is vested in the trial court to determine whether, from the evidence disclosed by the witness, he has shown that degree of intimitate acquaintenship which wauld enable the court to receive his opinion, with reference to sanity or insanity. Upon this point, we desire to cite,

Coller vs. State, 75 Ind. 511.
Southerland vs. Hawkins, 56 Ind. 349.
Commonwealth vs. Sturtivant, 117 Mass. 122 at p-137.
Unnes vs. Perry, 113 Mass. 274, at p-276.

Upon the ground, then, that the witness had not shown that degree of acquaintance with the defendant which is required, and upon the ground that the facts upon which the opinion was to be based were insufficient, the court did not abuse the discretion vested in it, and properly rejected the testimony. We submit there was no error here.

THE FIFTH CHARGE.

Plaintiff in error raises a question of the legal correctness of the fifth charge of the court found on page 25

of the printed record. We do not believe that the court will find that this instruction taken as a whole was prejudicial to the defendant. It is a familiar rule of law that it is improper to take a sentence or three or four lines out of the body of an instruction and to rear thereupon an argument. Counsel have done this. With reference to its legality the instruction must stand or fall as a unit. If the last four lines of the instruction were prejudicial to defendent, what immediately preceded went to the opposite extreme in being favorable to him. Under the language used:

"If one has sufficient mind and understanding to know right from wrong regarding the particular act and is able to comprehend and understand the consequences of such act, the law presumes him sane and holds him responsible for such acts; and in this connection, however if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment and at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such an act, then and in that event it will be your duty to find defendant guilty of murder as charged in the indictment."

And so, while the language quoted by plaintiff in error and complained of by him, may require a higher standard of sanity than is prescribed by our statute, in that that language seemed to require that he be unconscious of the consequences of his act as well as the wrongfulnes of it, before he can be acquitted; still the language immediately preceeding required him to be *conscious* of both the consequences and the wrongfulness of the act before he could be *convicted;* and to this language nobody but the

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territory could object, as it is certainly favorable to the defendant. And this latter is used in the form of a concrete illustration.

It is of course notorious that ordinary men will seize upon the idea conveyed by a concrete illustration, when the same idea stated abstractly would pass them by. Jurors as they listen to instructions delivered to them orally are not able to pick flaws and find distinctions and maintain the subtle arguments that counsel are able to do when sitting down with the written instructions before them, and the necessity of finding errors present to their mind.

And upon this instruction to answer sophistry by sophistry, the clause "was not able to comprehend and understand the consequences of such act" does not necessarily convey any other or further idea from the clause "that he was not able to know that the act of taking her life was wrongful." We believe we argue logically when we say that one who is unable to comprehend *one* of the consequences of an act, is unable to comprehend "*the consequences*" of an act. One of the consequences resulting from homicide is a moral injury inflcted. If the defendent did not know right from wrong, he did not know that he had committed a moral injury—did not realize *one* of the consequences of his act; it follows then that he could not be able, not knowing right from wrong in this instance, to understand the *consequences* of his act. The instructions can not be taken to mean, because illogical, that in order to fail to understand and comprehend the consequences of his act, that he must fail to understand and

comprehend *all* of the consequences universally; so that under this view, while the last four lines, upon which part of then instruction counsel base their ground for reversal, might be taken to be, upon careful examination, ambigious, it is not necessarily erroneous, and that ambiguity is cured by the language, used in the instruction immediately preceding.

That this instruction is in harmony with the adjudications of the Supreme Court of this Territory, we desire to quote a brief portion from the opinion in the case of Maas vs. Territory 10th Oklahoma, at page 717, where the very point argued by council is considered. "Under this section of the statute (section 1852 of the crimes act Oklahoma) cited by counsel in their brief on page "

"The test of responsibility is fixed at the point where one has the mental capacity to know that the act is wrong, and if one has sufficient capacity to distinguish between right and wrong as applied to the particular act, *and who understands the nature and consequences of such act*, he is responsible for the same; and it is immaterial what standard scientific men may fix, or by what rules the medical profession determines that one is a lunatic or insane, he is in law insane or a lunatic, or of unsound mind, or temporarily or partially deprived of reason to such an extent as will excuse him from punishment, only when he has not the capacity to know the wrongfulness of an act; this also embraces capacity to understand the nature and consequences of the same."

We believe with counsel that it does not neccessarily follow that the capacity to understand the nature and consequences of an act is necessarily include in the capacity to distinguish right from wrong, but do not agree with them to the extent that it is also necessarily excluded, but

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believe that the language used by the court does not necessarily convey the idea of a more stringent test than the ability to comprehend right and wrong, except in a few exceptional cases; for instance in the so called cases of partial insanity or fixed monomania or in cases where crimes have been committed under the influence of a so called "irresistible power."

Taking the instruction as a whole, bearing in mind what the effect of it, all, would leave upon the jury, and in view of the construction heretofore placed upon our statute by our Supreme Court, we believe no prejudicial error to have been committed.

JURORS' DISQUALIFICATION.

Plaintiff in error for his third point claims that he was prejudiced because of the fact that one of the jurors, J. F. Harper, who served during the trial and verdict was disqualified, having been convicted of grand larceny in the State of Nebraska. The record however, printed record page 13, shows that after evidence had been introduced, counsel on both sides had been informed of the facts of the alleged disqualification and were given an opportunity by the court to present the matter to the court and to exercise whatever rights they possessed by way of challenge or otherwise. The record discloses that the attorneys for plaintiff in error chose to sit silent. Commenting upon this action or rather failure to act upon the part of counsel, the Supreme Court of the Territory quotes the following language from Enc. of Pleading and Practice, volume 12, page 557, found on printed record p. 159:

"If rumors affecting the conduct of a juror are of so serious a character as to require a dismissal of the juror and the impanelling of another, it is incumbent upon counsel to move in the matter upon information of the prevalence of the rumor. They cannot sit silently by and speculate upon the result."

Further the court quotes from Thompson on Trials, section 114:

"A known cause of challenge is always waived by witholding it or raising it as an objection after verdict since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice. For counsel to sit in silence when the court is embarrassed in the process of panelling a juror, declining to take any action on the suggestions of the court and answering that they have nothing to say and then raising the proper objection in case the verdict goes against them, is a trifling with the court and the administration of justice which will not be tolerated on a trial of the gravest offences."

In reply to this, counsel raises the query whether the juror was subject to challenge at the time and cite in support of their contention (plaintiff in error's brief, page 9) sections 5167 and 5177 of the Statutes of Oklahoma.

In Hollingsworth vs. Duane, C. C. 147, it is said:

"If a party comes to set aside a verdict on the ground of a disqualified juror, he must make a very special case indeed. He must show from the nature of it, that ordinary diligence could not have affected the discovery; that he was surprised; or that after due inquiry and pains, he had missed or been misled as to the fact."

And further in Brown vs. Jacobs, 22 Fed. at page 243:

"But even if ignorance were an excuse to a party, in all cases, for not challenging a jury for a cause *propter delictum* or *propter affectum*, which is by no means clear in

Tennessee, there must be shown in addition that the party has been injured by reason of that particular juror taking part in the verdict. That he was not qualified is not sufficient; it must be further shown that the verdict was vitiated by reason of the juror's want of proper legal qualifications."

Citing Hill vs. Yates, 12 East 229.

Thompson and M. Jur. Sec. 295 et nota.

Plaintiff in error's motion for new trial and the affidavits in support and the record generally discloses that there was no due diligence; no effort made to discover the disqualification; no surprise and no injury to the appellant because of the disqualification. These affidavits occur in Printed Record pp. 36 and 37, and will be found not to contain even allegations of surprise or prejudice. Counsel say that the reason that they did not raise the objection to the juror's disqualification at the time of its discovery was because under the section of the Oklahoma Statutes, 5175, cited by them, Brief page 9, they could not challenge the juror after the testimony had been partially heard. The above statutes (and no other on our books) makes no distinction between challenges *propter defectum* or *affectum* and challenges *propter delictum*, but says:

"That the court for good cause shown may permit a juror to be challenged after he is shown to try the cause, but not after the testimony has been partially heard."

The "good cause" for challenge is in immediately following sections defined:

"5181—A challenge for cause may be taken either by the Territory or the defendant.

5182—It is an objection to a particular juror and is either:

First. General, that the juror is disqualified from serving in any case on trial; or

Second. Particular, that he is disqualifid from serving in the case on trial.

5183—General causes of challenge are:

First. A conviction for felony.

Second. A want of any of the qualifications, etc.

Third. Unsoundness of mind, etc."

All of the general causes for challenge are included by the legislature in the above statutory definitions; no distinction is made between the various sorts; "conviction for felony" is not placed in a specially privileged class; but all these cases, or any of them, must be brought to the attention of the court before testimony has been heard, and must then be "upon good cause shown." So far as the legislature of this Territory is capable of dealing with this subject, it has unmistakably expressed itself. If counsel rely upon these statutes as ground for failing to challenge, when the opportunity first arose; if they attempt to excuse themselves for not challenging before verdict under a statute which says that challenges must be interposed before *any part* of the testimony has been heard, where can they find their justification for waiting with the same sort of an objection until after *all the evidence* has been heard and the verdict has been returned? They admit (Brief p .) that it is not ground for challenge before verdict; have they shown any authority of statute for challenge after verdict, either by motion for new trial or otherwise? We believe we have shown elsewhere in this brief that the right of accused to be tried by jurors possessed of certain qualifications is not a constitutional but a statutory right; and it follows

that if he does not take advantage of a statutory right in the manner laid down by the statute, he must be taken to have waived it.

The court might consider that, in some instances, this would work a hardship upon the accused. The bias, criminality, insanity of a juror might not be discovered by the accused acting with diligence and in good faith, until after evidence had been introduced; and by reason of the statute, he would then be too late to avail himself of the disqualification. We submit that no consideration of this sort is involved in any question presented in this case; because the defendant never did call upon the trial court to rule upon a challenge, to this juror. But, should he have entered his challenge when he first discovered the disqualification, and the court had disallowed it, because he was too late, we are not sure that the defendant would have been prejudiced, any more than if the Legislature should have repealed the above quoted sections, before this crime had been committed. A right that has been given by a statute may be taken away or regulated by a statute.

That our statute is but confirmatory of the common law, so far as appellant's right to complain after verdict is concerned. See

4th Black (Cooley, 3d Edit.) p. 350.
2 Hall P. C. 293.
Bac. Abridg. "Juries." 365-366.

Upon this point we desire to cite the following cases:

Brewer vs. Jacobs, 22 Federal Report 217, at p. 236 etc. See p. 241.
Fisher vs. Yoder, 53d Federal Report 565.

State vs. Ready 44th Kan. 700.
State vs. Jackson 27th Kan. 581.
Cox vs. People 80th New York, 500.
Stewart case 15th Ohio State 159.
Dilworth vs. Commonwealth, 12 Gratt. (Va.) 689.
Bristow case 12 Gratt. 646-647.
Childres vs. Ford, 18th Miss. 25.
People vs. Stewart 64 Cal. 60.

Under the common law procedure, the right to peremptory challenge or challenge for cause was considered as waived if not interposed at the proper time and the disqualification is waived if the juror was not so challenged. So that under the common law if the objection that the juror is disqualified is not interposed at trial it is waived and the person disqualified may constitute a juror of twelve.

Coke on Littleton, volume 1, section 234, pages 155a to 158b.
Chelsea Waterworks Company case 10th Exch. 731.
Hill vs. Yates, quoted in Cole vs. Lehlback, 160 U. S. 93.
Hollingworth vs. Duane, Federal Case No. 6618.

"When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict."

Wassum vs. Feeney, 121 Mass. 93.
Jeffrey vs. Randal, 14 Mass. 205.
Woodward vs. Dean, 113 Mass. 297.
State vs. Scott 56 Mich. 154; 22 N. W. 274.
Leper case 29 Texas Appeals 63.
Lane case 29 Texas Appeals, 310.
May vs. State 37th S. W., 721.
People vs. Mortier, 58 Cal. 262.
Garrett vs. Weinberg, 31 S. E., 341; overruled by

Mew vs. Charleston, 32 S. E., 828. (So. Car.)
State vs. Hartley, 40 Pac. (Nev.) 374.
Pickett case 39 L. R. A. 302 (Iowa.)
State vs. Robinson, 54 S. C. 147.
Powers case 10th Oregon, 145; 45 Am. Reports, 138.

But plaintiff in error contends that the disqualification of the juror, Harper, because of his conviction of a felony is such a disqualification as could not be waived by him; that his right to a properly qualified juror is a personal right and privilege and must be given to every one tried in capital cases; that this is a constitutional right and cannot be waived. In answer to this we have to say that a criminal has no vested constitutional right in the practice and procedure under which he is to be tried.

Maxwell vs. Dow, 20th Supreme Court Reports, 449.
Iowa Cen. R. R. vs. Iowa, 160 U. S. 389.
Hornbuckle vs. Toombs, 18th Wallace, 648.
Hershfield vs. Griffith, 18th Wallace, 657.
Davis vs. Billand, 18th Wallace, 659.
Miles vs. United States, 103 U. S., 304.

The case of Reynolds vs. United States, 98 U. S. 145, holds that the number of grand jurors necessary to find an indictment in the Territory must be determined by the territorial laws and not the acts of Congress.

The case of Clinton vs. Englebrecht, 13th Wallace, 434, holds that the laws of the Territorial Legislature providing mode and manner of impanelling grand and petit jurors must govern in the courts of the Territory. To the same effect and holding is the case of Thiede vs. Utah, 159 U. S., 514. All of which cases determine that the Territorial Legislature has the power to fix such

qualifications to a trial juror as it may see proper, and may omit or add to all or any of the common law qualifications. It is not contended that the Territorial Legislature has the power to proyide for trial by a jury of a less number than twelve, but this point is not involved in this case, and for that reason the case of Thompson vs. State of Utah, 190 U. S. 343, does not in any way conflict with or overrule the cases herein before cited. The trial must be before twelve men, for the same reason that it must be before the court and vice versa, but the qualifications of the individuals composing the court and the jury is a matter left to the discretion of the Terrttorial Legislature. That the due process of law referred to and mentioned in the constitution does not apply to matters of practice and procedure either under the State or Territorial courts, will be found to be unquestionable from the cases above cited. If the qualification of jurors, the individuals to compose the jury, is a proper subject of legislation, practice and procedure in the Territory, of all cases in such court, it is so by virtue of the constitution and the laws of Congress. The fifth amendment to the Constitution of the United States has the same relation to the Territory that the fourteenth amendment has to the States. The following cases have decided beyond question that the fourteenth amendment does not operate to control the practice and procedure of State courts:

Mun vs. Louisiana, 94 U. S., 114.
Kelly vs. Pittsburg, 104 U. S., 78.
Nashville R. R. Co. vs. Alabama, 128 U. S., 96.
Hallinger vs. Davis, 146 U. S., 314.
U. S. vs. Cruickshank, 92 U. S., 542.
Maxwell vs. Dow, 20th Supreme Court Reports, 449.
Scott vs. Toledo, 36 Fed., 385.

In matters in which the citizens of the State are protected under the fourteenth amendment of the constitution, the citizens of the Territory are protected under the fifth and sixth amendments with this further provision, that the citizens of the State may change their organic law and may provide that a less number than twelve individuals may compose a jury in a capital case. The Congress of the United States, it appears, cannot do this, but it can and does provide the mode and manner of the selection of such jury.

If the Territorial Legislature has the power to fix and establish the qualifications of the individuals that are to constitute the jury in a capital case, then it is that this qualification is not established by the constitution and is not a constitutional or vested right and hence it is a right that may be waived.

It is true that the common law that fixed the number of jurors also fixed the qualifications of the individuals composing the jury, but these qualifications, as the cases herein cited must show, have at all times been subject to change by the Legislature. The qualifications of a juror according to the common law, at the time of the adoption of the amendment to the constitution referred to are not the qualifications recognized by the Congress of the United States or the courts of the United States. One of these qualifications was that a juror should be a free man and should have an income equal to at least forty pounds per annum; another qualification was that if the party proceeded against was a foreigner, he was entitled to a certain number of men of his nationality, on his jury.

These qualifications are certainly not now recognized. And, again, the formation of the juror is as much within the letter or purview of the constitution as are the qualifications. Under the common law the sheriff is required to select a certain number of men for a term of court, these men to be selected out of the proper county in which the court was held, a list with one name under the other of all persons summoned, this list called the "array or jury poll." In performing this duty the sheriff was to make his own selection; this is a qualification of the common law for jury service and yet is not practiced or recognized, but is subject to regulation by the Congress or the Territorial Legislature. The number of challenges, mode and method of challenge, are well defined in the common law but are certainly not controlling in our courts. There are many grounds for challenge and disqualification under the common law that are entirely at variance with our institutions. See upon this subject:

Coke vs. Littleton, Vol. 1, Sec. 234, page 155a to 158a.
Sharswood's Blackstone, Vol. 2, pages 352, 353 and 354.

The uniform practice in federal courts for more than fifty years has been to impanel jurors in capital cases with qualifications different from those prescribed by the common law. See section 800, chapter 15, revised statutes of the United States. The qualifications of jurors in the Indian Territory vary materially from the common law qualifications. See Indian Territory Statutes; 1899 (Carter) Section 1578, Chapter 40 and Section 8, United States Statutes at large, Volume 25, page 783. If the qualifications of jurors as fixed by the common law do not control

under the practice in the federal courts, and if Congress has acted upon a contrary rule for fifty years. then the law is as declared by Congress and practiced by the courts under such acts and laws; and if the constitutional guarantee of a trial by jury does not refer to the qualification, and as we have seen is not binding on Congress and federal courts so as to require twelve men possessing all of the common law qualifications, then it is not binding on the Territorial courts, they being creatures of the same Congress.

WAS THE JUROR DISQUALIFIED?

If Harper is disqualified at all, it is by reason of the peculiar provisions of our statutes and not by reason of the common law, and by reason of the following:

" and who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary."

Ok. Stat. 1893, Sec. 3096.

"General causes for challenges are: First, a conviction of felony."

Ok. Stat. 1893, Sec. 5183.

"A felony is a crime which is, or may be, punishable with death, or by imprisonment in the Territorial prison."

Ok. Stat. 1893, Sec. 1841.

All criminal offenses not so punishable are misdemeanors, must be defined by statute and are not punishable by the common law.

It is reasonable to assume that when the law of this Territory speaks of "the Territorial prison," as in Sec. 1841, supra, it means the prison of Oklahoma Territory. It is likewise reasonable to infer that when it speaks gen-

erally of a "felony," as in Sec. 5183, supra, a felony as created by our Territorial statutes is intended, and not a common law felony. Now, can it not as reasonably and certainly be contended that when, in Sec. 3093, supra, the statutes of this Territory refer to "the penitentiary," the "Territorial prison," the penitentiary of this Territory is intended, and no other?

It appears by the record p. 669 that Harper was convicted in the State of Nebraska of the larceny of $66.00, (grand larceny), and sentenced to the penitentiary of that State; he has not been guilty of any offense punishable by the laws of this Territory.

By the laws of the States of Nebraska, Kansas and Vermont and the Territory of New Mexico, larceny is divided into petit and grand; in each of these jurisdictions petit larceny is a misdemeanor, grand larceny a felony. The statutes of each defining felony and misdemeanor are practically identical with those of Oklahoma. The amount necessary to constitute larceny a felony or make punishable by imprisonment in a penitentiary or State prison, varies in the several States and Territories. In this Territory it must be more than $20.00; in New Mexico more than $100.00; and in Vermont only more than $7.00.

Laws New Mexico (1884) Secs. 742-743.
Statutes of Vermont (1894) Secs. 4939, 4940, 5166.

From this it may be easily deduced, that if Harper had committed a like offense (i. e. stolen $66.00) in New Mexico instead of Nebraska, he would not have been disqualified as a juror in Oklahoma, because he would not have been convicted of a criminal offense punishable by

imprisonment in the penitentiary. On the other hand, if he had been convicted in Vermont of stealing say only $10.00, under the theory of the defense, he would be disqualified, although the theft of a like amount in Oklahoma would not have affected his qualification. Tested by the provisions of the Oklahoma Statutes the rule touching the qualification of jurors would be uniform, as it should be; otherwise there would be practically as many rules as there are States and Territories.

Much is said in plaintiff's brief about the disqualification of the juror, Harper, being a "positive or absolute disqualification;" and about it's being a higher power of disqualification than others, and for that reason not to be waived. No cases are cited by them in support of this distinction.

We take the position that there is no great, greater, greatest disqualification; at any rate, that no such distinction, if it should be found to exist, would avail appellant in this case, raising the objection, as he does, for the first time after verdict.

"Generally an objection to a juror for incompetency *from any cause* is waived if not made before verdict. The disqualification of a juror has, however, been frequently made the ground of an application for a new trial or other relief after verdict, and the courts have not been in unison in their action on such applications. *It is agreed that one who knew of a ground of disqualification before or during the trial cannot present such objection for the first time after verdict, and he must actually show the want of such knowledge on his part.*

A. & E. Encyc 2nd Edit. Vol. 17, p. 1161, and cases cited, Note 5.

We have attempted to show heretofore that our statutes contemplate no such distinction between grades of

disqualification. And the case of Clinton vs. Englebrecht, 13 Wall., at page 445, holds that "the whole subject matter of jurors in the Territories is committed to Territorial regulation."

If there is any distinction to be made between disqualifications, it is simply between those that are constitutional and those that are statutory; and the one in question here we believe we have shown to be of the latter order.

Respectfully submitted,

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